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CPLR 203(c): Tolling Provisions for Defenses and Counterclaims Extended to Cross-Claims

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however, do not apply in the absence of a professional relationship.¹⁸ Moreover, in a case such as *Colpan*, wherein the insurer denied responsibility for the conduct of the litigation from the outset, the concept of reliance upon a continuing course of representation is misplaced.¹⁹ No injustice is done by requiring that the insured assert his claim within 6 years of the purported breach.

It is submitted, therefore, that the *Colpan* court's application of the continuous treatment doctrine to an insurance company's covenant to defend is an erroneous extension of the doctrine. The decision burdens insurers with substantially extended potential liability, and yet is not supported by the policy considerations which justify application of the doctrine of continuous treatment in malpractice actions.

CPLR 203(c): Tolling provisions for defenses and counterclaims extended to cross-claims.

CPLR 203(c) permits the interposition of a defense or counterclaim even though such defense or counterclaim would be barred by the applicable statute of limitations were it to be prosecuted as an independent cause of action.²⁰ This provision codifies the doctrine of relation back, whereby any time-barred defense or counterclaim is maintainable so long as it is not time barred when the plaintiff commences his cause of action.²¹ Moreover, even if the

¹⁸ See note 17 *supra*. One recent case has extended the continuous treatment exception to actions in contract against an attorney. *Grago v. Robertson*, 49 App. Div. 2d 645, 370 N.Y.S.2d 255 (3d Dep't 1975) (mem.) (cause of action accrued at termination of representation in action for breach of contractual obligation to preserve legal interests). Since the justification for the doctrine is based upon the nature of the professional relationship, it is appropriate to apply it to all wrongs committed within the framework of that relationship, whether the allegations sound in tort or contract.

¹⁹ See note 13 *supra*.

²⁰ CPLR 203(c) provides:

A defense or counterclaim is interposed when a pleading containing it is served. A defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed, except that if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed.

²¹ Under the CPA, the statute of limitations on a counterclaim continued to run until service of the answer containing the counterclaim. See CPA § 11. Plaintiffs who feared counterclaims based on the same occurrence were encouraged to delay commencement of a lawsuit until it would be difficult or impossible for the defendant to timely interpose his counterclaim. 7B MCKINNEY'S CPLR 203(c), commentary at 119 (1972). The doctrine of relation back, as codified in the CPLR, has been readily accepted and applied by the courts. See, e.g., *Styles v. Gibson*, 27 App. Div. 2d 784, 277 N.Y.S.2d 245 (3d Dep't 1967); *Ornter v. Booth*, 21 App. Div. 2d 663, 249 N.Y.S.2d 946 (1st Dep't 1964); *Star Credit Corp. v. Ingram*, 170 N.Y.L.J. 1, July 2, 1973, at 2, col. 1 (App. T. 1st Dep't).

counterclaim or defense is time barred when the action is commenced, it may be asserted if "the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends."²² This second part of the statute is a codification of the doctrine of equitable recoupment,²³ and a defense or counterclaim protected by it may be used only as a setoff.²⁴ Although CPLR 203(c) speaks specifically of defenses or counterclaims, the Appellate Division, First Department, in *Seligson v. Chase Manhattan Bank*,²⁵ extended the tolling provision to include the assertion of cross-claims between codefendants.

The plaintiff in *Seligson* was the trustee for the bankrupt partnership of Ira Haupt & Co. Plaintiff commenced an action against Chase Manhattan Bank (Chase), seeking to have Chase recredit Haupt's account for two checks that were paid over a forged endorsement (the Haupt checks).²⁶ Chase then brought an action predicated on guaranty of endorsement and warranty of good title against both the depository bank, Central Bank (Central), and its intermediary bank, Chemical Bank (Chemical).²⁷ The forger, Joseph Gil, had used the two checks to open an account at Central. Shortly thereafter, when he attempted to withdraw the funds in cash,²⁸ Central refused to honor his request, and instead permitted him to withdraw the money in the form of two checks (the Gil checks) drawn on the Central account for the same amount as the Haupt checks and payable to the same parties.²⁹ Gil again

²² CPLR 203(c).

²³ While the doctrine of equitable recoupment was available under the CPA, its use was confined to contract cases. For instance, a defendant who was sued on breach of contract could interpose the plaintiff's breach of contract but not a claim based in tort. *See, e.g., Hammill v. Curtis*, 18 App. Div. 2d 749, 235 N.Y.S.2d 831 (3d Dep't 1962) (mem.); *Title Guar. & Trust Co. v. Hicks*, 283 App. Div. 723, 127 N.Y.S.2d 340 (2d Dep't 1959) (mem.). *See also* 1 WK&M ¶ 203.25; 7B MCKINNEY'S CPLR 203(c), commentary at 119 (1972). CPLR 203(c) removed the restriction that recoupment may be had only in contract actions; it provides that recoupment relief is available so long as the defendant's claim arises from the transaction(s) upon which the plaintiff's claim is based. *See, e.g., Headley v. Noto*, 22 N.Y.2d 1, 237 N.E.2d 871, 290 N.Y.S.2d 726 (1968); *Chevron Oil Co. v. Atlas Oil Co.*, 28 App. Div. 2d 644, 280 N.Y.S.2d 731 (4th Dep't 1967) (mem.). It has been suggested that this new proviso should itself be liberally applied. 1 WK&M ¶ 203.25.

²⁴ CPLR 203(c). *See, e.g., Headley v. Noto*, 22 N.Y.2d 1, 237 N.E.2d 871, 290 N.Y.S.2d 726 (1968); *First Nat'l City Bank v. Drake*, 170 N.Y.L.J. 62, Sept. 27, 1973, at 17, col. 6 (N.Y.C. Civ. Ct. N.Y. County).

²⁵ 50 App. Div. 2d 206, 376 N.Y.S.2d 899 (1st Dep't 1975).

²⁶ *Id.* at 207, 376 N.Y.S.2d at 901.

²⁷ *Id.* at 208, 376 N.Y.S.2d at 902. *See also* Brief for Appellant at 6-7, *Seligson v. Chase Manhattan Bank*, 50 App. Div. 2d 207, 376 N.Y.S.2d 899 (1st Dep't 1975).

²⁸ The time span between opening the account at Central and the subsequent closing of the same was only 6 days. Brief for Appellant at 5.

²⁹ The court surmised that Central believed the whole transaction to be of a dubious nature. 50 App. Div. 2d at 207, 376 N.Y.S.2d at 901.

forged the payees' signatures and, coincidentally, used the Gil checks to open a new account at Chemical. Central then honored the Gil checks upon presentation for payment by Chemical.³⁰

The *Chase* and *Seligson* actions were commenced by service of summons on November 1, 1968 and November 5, 1968, respectively.³¹ Both actions, timely commenced within the applicable statute of limitations,³² were permitted to lay dormant for some 4 years.³³ The *Seligson* complaint was served on Chase on March 30, 1972. Central received the Chase complaint on August 28, 1972 and Chemical was served by Chase on November 5, 1973. When the defendants in the *Chase* action served their answers, Central on January 5, 1973 and Chemical on December 11, 1973, each pleading contained a cross-claim. Chemical's cross-claim was based on its reliance upon Central's guaranty of the endorsements and warranty of good title to the Haupt checks, while Central's cross-claim asserted that Chemical was similarly liable on the Gil checks. Additionally, Central claimed it was entitled to recoup from Chemical if Chase recovered judgment against Central. Chemical successfully moved in special term to dismiss Central's cross-claim as time barred.

On appeal, the First Department affirmed.³⁴ Declaring that the only distinction between a counterclaim and a cross-claim is the party alleged to be liable,³⁵ the court reasoned that the failure to

³⁰ *Id.*, 376 N.Y.S.2d at 902.

³¹ CPLR 203(b) provides that for the purpose of determining whether a claim is timely, a claim in a complaint is interposed when service of summons is made on the defendant. The statute of limitations, therefore, runs from the accrual of the cause of action, CPLR 203(a), to the date of service of summons.

³² The first action had a 6-year statute of limitations since it was based upon a contractual obligation between Ira Haupt & Co. and Chase. *See* CPLR 213(2). Similarly, the second action, based on guaranty of endorsement and warranty of good title, was also governed by a 6-year period of limitations. *See id.* The cause of action, in both cases, accrues from the time when the right to make the demand was completed, *i.e.*, when the checks were cashed. *See* *Homer Eng'r Co. v. New York*, 12 N.Y.2d 508, 191 N.E.2d 455, 240 N.Y.S.2d 973 (1963). Had *Seligson* been decided under the Uniform Commercial Code, the cause of action would have accrued from the notice of honor. N.Y.U.C.C. § 3-122 (McKinney 1964). Since the cause of action accrued prior to the adoption of the Code, it was governed by pre-Code case law.

³³ The service of further pleadings, after the service of summons, was deferred upon an agreement between the attorneys for all parties while *Seligson* attempted to recover the money from a third party. After *Seligson's* attempts failed, the complaints were then served. Brief for Appellant at 17.

³⁴ Special Term had granted Chemical's motion on the ground that although Central's cross-claim was within the purview of CPLR 203(c), the section did not protect the cross-claim since Central's claim was based on the Gil checks. Although affirming the result in the supreme court, the appellate division found this rationale invalid because the lower court applied the same-transaction or series-of-transactions requirement to the doctrine of relation back, as well as to equitable recoupment. 50 App. Div. 2d at 208-09, 376 N.Y.S.2d at 902-03.

³⁵ *Id.* at 209, 376 N.Y.S.2d at 903. Compare CPLR 3019(a), with CPLR 3019(b). *See also* H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 134-40 (4th ed. 1973).

include cross-claims within section 203(c) was merely a "legislative oversight."³⁶ Accordingly, the *Seligson* court had no difficulty in extending the ambit of the section to include cross-claims.³⁷ Interpreting the court's language literally, the doctrine of relation back would have preserved Central's cross-claim since the 6-year statute of limitations on Central's action had not yet run when Chase commenced the original action. The court then held, however, that the Central cross-claim was not saved by the statute because it was based on the Gil checks and was thus unrelated to the claims of Chemical and Chase on the Haupt checks.³⁸ The court had previously noted that the equitable recoupment provision of section 203(c) is needed only where the counterclaim or defense is not preserved by the doctrine of relation back, since it was time barred at the time of the interposition of the complaint.³⁹ Thus, for the *Seligson* court to have used the recoupment provision, it must first have decided sub silentio that Central's claim was time barred at the interposition of the "complaint." Clearly, the Central claim was not time barred at the commencement of the main action. Although the court did not explicitly state which pleading was to be considered the "complaint" against which the cross-claim was interposed as a "defense," it implicitly selected the time of filing of the Chemical cross-claim against Central as the applicable date.⁴⁰ In effect, the court viewed the crossing cross-claims as constituting an entirely separate action. Chemical's cross-claim against Central for indemnity⁴¹ served as the "complaint" which must be looked to in determining whether the relation back provision of CPLR 203(c) is applicable.⁴² Since the Central claim was time barred as of the date the Chemical cross-claim was interposed,⁴³ the doctrine of relation

³⁶ 50 App. Div. 2d at 210, 376 N.Y.S.2d at 904.

³⁷ *Id.* This judicial extension of CPLR 203(c) was predicated upon CPLR 3019(d), which states that "[a] cause of action contained in a counterclaim or a cross-claim shall be treated, as far as practicable, as if it were contained in the complaint . . ." For a discussion on the requirements of pleading and trying a counterclaim or a cross-claim, see 7B MCKINNEY'S CPLR 3019(d), commentary at 228-30 (1974).

³⁸ 50 App. Div. 2d at 210, 376 N.Y.S.2d at 904. If the Central cross-claim were related to the Chase action, it would not have been time barred. Since the cause of action on the Gil checks accrued, at the earliest possible date, on November 18, 1962, Brief for Appellant at 6-7, the period of limitations on Central's claim would have run until the end of November 1968. Chase commenced the action against Central with service of summons on November 1, 1968. Thus, when the action was commenced, time had not expired on any cause of action Central may have had against Chase.

³⁹ *Id.* at 209-10, 376 N.Y.S.2d at 903.

⁴⁰ *Id.* at 210, 376 N.Y.S.2d at 904.

⁴¹ See note 45 *infra*.

⁴² CPLR 3019(d), discussed in note 37 *supra*, lends some credence to the court's reasoning.

⁴³ Since Chemical asserted its indemnity claim on December 11, 1973, and since Central's cause of action accrued on November 18, 1962, the statute of limitations applicable to Central's claim had expired approximately 5 years prior to service of Chemical's cross-claim.

back was inapplicable. The court then looked to the recoupment provision of the section and similarly found it to be inapplicable since the claim on the Gil checks was "unrelated to the claims of Chase and Chemical on the Haupt checks."⁴⁴

Although the application of CPLR 203(c) to cross-claims may have led to an equitable result in *Seligson*, it is submitted that the court could have easily protected the intermediary bank, Chemical, in a simpler manner. Since the court held that Chemical's cross-claim was grounded in indemnity,⁴⁵ it could have avoided its radical modification of section 203(c) by stating that the indemnity statute of limitations had not yet run, and thus Chemical's claim was timely, while Central's cross-claim was based on breach of warranty, and was thus time barred.⁴⁶

The problematic decision to include cross-claims within 203(c) should have been purely a legislative decision. The legislature, unlike the courts, is designed to investigate and debate the soundness of such an extension. The court looked only to the case before it, and could not thoroughly consider the procedural and substantive ramifications of the decision.⁴⁷ The *Seligson* court's unsup-

⁴⁴ 50 App. Div. 2d at 210, 376 N.Y.S.2d at 904. Without much discussion, the court was ready to dismiss Central's claim on the Gil checks as not within the same transaction or series of transactions upon which Chemical's claim was based. In fact, the court noted that happenstance was the only factor which provided any connection between the two separate transactions. As the court itself stated, "Central's claim on the Gil checks . . . is unrelated to the claims of Chase and Chemical on the Haupt check. Indeed, the point is underscored by the sheer fortuity of circumstances which led Gil to deposit the second checks in a branch of Chemical." *Id.* It is submitted, however, that the Central's claim actually arose from the same series of transactions as did the claims on the Haupt checks. There are several reasons why the two should be deemed part of the same series of transactions: (1) the Haupt checks gave rise to the Gil checks; (2) Chase's and Central's claims are both essentially based upon forgery by Gil; (3) the theories of recovery asserted by the banks are the same; (4) both sets of checks were in the same amount and payable to the same individuals; (5) the time between the two events was only 6 days. Brief for Appellant at 12-13. If the same-transaction requirement is to be broadly construed, *see* note 23 *supra*, there is no reason why the claims of Chase, Chemical, and Central should be deemed unrelated.

⁴⁵ Although the court initially stated that Chemical's cross-claim was based on the warranty of prior endorsement, it was implicitly assumed throughout the opinion that Chemical's claim was one of indemnification. The applicable statute of limitations for indemnity is 6 years. CPLR 213(1). It does not begin to run until liability first arises against the indemnitee. *See, e.g.,* Corbetta Constr. Co. v. George F. Driscoll Co., 17 App. Div. 2d 176, 180, 233 N.Y.S.2d 225, 229 (1st Dep't 1962); Griffin v. Caldwell, 37 Misc. 2d 941, 942, 235 N.Y.S.2d 123, 124 (Sup. Ct. Monroe County 1962); Antonelli v. City of Mount Vernon, 20 Misc. 2d 331, 189 N.Y.S.2d 52 (Sup. Ct. Westchester County 1959). Thus, the statute of limitations could not begin to run against Chemical's claim for indemnification until judgment was rendered against it. An indemnification claim, however, may be pleaded prior to actual accrual of the right. *See* CPLR 3019(b); Bides v. Abraham & Strauss Div. of Federated Dep't Stores, Inc., 33 App. Div. 2d 569, 305 N.Y.S.2d 336 (2d Dep't 1969) (mem.).

⁴⁶ Had the court treated Central's cross-claim as an independent cause of action, the statute of limitations would have expired 6 years from November 18, 1962. *See* note 43 *supra*.

⁴⁷ The extension of CPLR 203(c) to cross-claims poses many other unanswered questions. Must the first cross-claim be a viable cause of action, not yet time barred when it is

ported statement that the absence of cross-claims from the language of CPLR 203(c) was a result of "legislative oversight,"⁴⁸ is weak support for such a significant modification of the statute. Moreover, rather than avoiding a multiplicity of suits, the extension of CPLR 203(c) actually will increase the burden on the court system by permitting a new class of time-barred claims to be revived in extended trials.

ARTICLE 3 — JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

CPLR 302(b): Matrimonial domicile basis of jurisdiction strictly construed.

CPLR 302(b) allows a court, in certain circumstances, to exercise personal jurisdiction over a nonresident or nondomiciliary defendant in an action brought by a New York domiciliary or resident seeking support or alimony.⁴⁹ One situation in which the exercise of personal jurisdiction is permitted by the statute is where New York was "the matrimonial domicile of the parties before their

asserted? What if the first cross-claim is time barred, and yet relates to the events under consideration in the main action? Although *Seligson* involves a major change in New York procedural law, the court apparently gave no consideration to these and similar problems.

⁴⁸ 50 App. Div. 2d at 210, 376 N.Y.S.2d at 904.

⁴⁹ CPLR 302(b) provides:

A court in any matrimonial action or family court proceeding involving a demand for support or alimony may exercise personal jurisdiction over the respondent or defendant notwithstanding the fact that he or she is no longer a resident or domiciliary of this state, or over his or her executor or administrator, if the party seeking support is a resident of or domiciled in this state at the time such demand is made, provided that this state was the matrimonial domicile of the parties before their separation, or the defendant abandoned the plaintiff in this state, or the obligation to pay support or alimony or alimony [*sic*] accrued under the laws of this state or under an agreement executed in this state.

The statute was enacted by the legislature in 1974. Ch. 859, § 1, [1974] N.Y. Laws 1339 (McKinney). Such an amendment to New York's long-arm statute became increasingly necessary as a result of the Supreme Court's decision in *Williams v. North Carolina*, 317 U.S. 287 (1942), wherein the Court held that an ex parte divorce is entitled to full faith and credit if one spouse is domiciled in the divorce forum. *Williams* thus enabled one spouse to abandon the other by moving out of state, establish domicile in a state with liberal divorce laws in order to obtain an ex parte divorce, while at the same time remaining immune from any claim for support, such demand being considered an action in personam requiring personal jurisdiction over the nonresident defendant. See *Renaudin v. Renaudin*, 37 App. Div. 2d 183, 323 N.Y.S.2d 145 (1st Dep't 1971). In most cases, attempts to acquire personal jurisdiction over nonresident defendant-spouses by use of the traditional long-arm statute, CPLR 302(a), have been unsuccessful. See, e.g., *Whitaker v. Whitaker*, 32 App. Div. 2d 595, 299 N.Y.S.2d 482 (3d Dep't 1969); *Kochenthal v. Kochenthal*, 28 App. Div. 2d 117, 282 N.Y.S.2d 36 (2d Dep't 1967); *Baum v. Baum*, 62 Misc. 2d 305, 307 N.Y.S.2d 305 (Sup. Ct. Queens County 1970); *Inkelas v. Inkelas*, 58 Misc. 2d 340, 295 N.Y.S.2d 350 (Sup. Ct. Bronx County 1968). New York has enacted the Uniform Support of Dependents Law, DRL §§ 30 *et seq.*, under which a New York petitioner may bring a proceeding to compel support from a respondent residing in a state having substantially similar or reciprocal laws. The Uniform Law, however, is inapplicable to ex-spouses.